SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1091

LOCAL 342, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW), VAN E. WARREN, MARK BROCKETTE, GAIL M. TRIBBLE, LEWIS C. STONE, SHIRLEY J. JUDKINS, DELBERT STORIE, AND PERRY CARLTON,
Petitioners,
v.
TRW, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONERS' BRIEF IN REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

STEPHEN I. SCHLOSSBERG,
JOHN A. FILLION,
Attorneys for Petitioners,
8000 East Jefferson Avenue,
Detroit, Michigan 48214.

JORDAN ROSSEN,
BERNARD F. ASHE,
STANLEY LUBIN,
Of Counsel,
8000 East Jefferson Avenue,
Detroit, Michigan 48214.

Interstate Brief & Record Co., 1036 Beaubien St., Detroit, Michigan 48226
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ARGUMENT

(Unless otherwise indicated, page references are to the Petition for Certiorari. Those which include the letter "a" are to the Appendix part of the Petition.)

The court below ruled that the collective bargaining agreement was so clear and unambiguous as *not to allow of interpretation*, and refused to enforce the arbitrator's

decision on the ground that *it was based on an interpretation.* The court said:

> "We consider that the company's contract with the union, of which all the individuals were members, gave it a clear right to do what it did. The language of this contract was not ambiguous, nor did any of its terms require interpretation by the arbitrator or the courts." (p. 30a).

This case, therefore, stands for the proposition that there are arbitration decisions which are based on the arbitrator's interpretation of the contract which are nevertheless not entitled to enforcement—those in which the meaning of the contract is so clear to the court as not to permit of interpretation. The decision is thus in square conflict with the basic principle of the law of labor arbitration this Court fashioned in the Steelworker Trilogy[1]—that the courts are not to redecide the merits of arbitration decisions. As the court articulated this principle in *Steelworkers v. Enterprise Corp.*, 363 U.S. 593, 596:

> "The refusal of courts to review the merits of an arbitration award is the proper approach to arbitration of collective bargaining agreements. The federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the awards."

Unless reversed, this decision will stand as a guide to courts on how to refuse to enforce arbitration awards with which they disagree—by simply declaring the contract so clear as not to allow of interpretation, and denying enforcement on the ground that the award is based on an interpretation.

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[1] *Steelworkers v. American Mfg. Co.*, 363 U.S. 564; *Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574; *Steelworkers v. Enterprise Corp.*, 363 U.S. 593.

In its Brief in Opposition, the Company contends that the court below denied enforcement on the ground that the arbitrator's decision was based on terms he added to the contract.[2] It is true, as we noted in the Petition (pp. 8-9, 18-19), that after striking down the arbitrator's decision on the ground that the contract was clear and not subject to interpretation, the court below stated that the arbitrator's conduct "constituted the addition of terms to a negotiated contract which was neither unclear nor incomplete" (p. 31a). This, however, was but a transparent effort to bring the court's decision within *Enterprise*.[3] It

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[2] The first "addition" the Company complains of—"active encouragement of others to strike"—was a standard of selective discipline adopted by the *Company*, not the arbitrator, as both the arbitrator and the district court carefully noted (pp. 11a, 22a). The second—"procedural unfairness"—was used by the arbitrator in discussing the Company's failure to disclose the real ground for the employees' discharge until the arbitration hearing. The standard was a valid inference from the contract (see p. 18, n. 6). But, in any event, the arbitrator went on to rule the Company's conduct in violation of the *grievance procedure provisions* of the contract, in the following words:

> "In any event, for the Company to withhold the real basis for discharge while a grievance is being processed results in preventing the grievance machinery from carrying out its intended function." (p. 16a).

[3] Betraying its concern over the grounds relied upon by the court below in denying enforcement, the Company, at page 11 of its brief, seeks to substitute one not mentioned by the court and raised for the first time here—that in ruling that the Company violated the grievance procedure, the arbitrator decided an issue not submitted to him, since at the arbitration hearing the parties stipulated "that all preliminary procedures had been carried out" (p. 2a). However, this Court's decision as to whether to review a lower court's opinion is based not on the grounds the lower court *might* have employed, but on the ones it *did*. Cf. *S.E.C. v. Chenery Corp.*, 318 U.S. 80 (1943). Moreover, the substitute ground now offered by the Company is baseless. The Union could not have waived, in a stipulation entered into at the beginning of the arbitration hearing, conduct of which it became aware only later in the hearing—the Company's withholding of the real basis for discharge.

is perfectly apparent that what the court did was (1) interpret the contract for itself; (2) compare the arbitrator's interpretation with its own; and (3) conclude that the arbitrator must have added terms to the contract, since his interpretation included some not found in its own (see pp. 8-9).

As the arbitrator and the district court made clear, the arbitrator based his decision on his interpretations of the selective discharge and grievance procedure provisions of the contract, including terms which he found were implied by those two provisions (p. 18 n. 6). Because the court did not agree with the arbitrator's interpretations it was not free to get rid of them by simply calling them new terms he had added to the contract. Even if it is assumed that the arbitrator's interpretations are wrong, they are nevertheless interpretations, not added terms, and are entitled to enforcement; for as the Court stressed in *Enterprise*, "the courts have no business overruling [the arbitrator] because their interpretation of the contract is different than his." 363 U.S. at 599.

Of course, an arbitrator cannot simply write brand new terms into a contract, i.e., terms which are absolutely unrelated in any way to any of the contract's express provisions. But where an arbitrator, in studying the provisions of the contract, finds that they imply terms not expressly set forth, he is not adding terms to the contract but interpreting it. See, e.g., *Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 580-83; *Rubber Workers Local 135 v. Dunlop Tire Co.*, 391 F.2d 897, 899 (2d Cir. 1968). That is what the arbitrator did in this case, and it is what the court below said "constituted the addition of terms to a negotiated contract".

This decision, therefore, teaches two methods by which courts can circumvent *Enterprise* and redecide the merits

of arbitration decisions with which they disagree. (1) Declare the contract to be so clear as not to allow of interpretation, and strike down the arbitrator's decision as based on an interpretation. (2) Compare the arbitrator's interpretation with the court's and call any terms not included in the court's (especially implied ones) terms the arbitrator has added to the contract.

If arbitration cases are to be finally decided by the arbitrators and not the courts, as our federal labor policy requires, *Enterprise*, 363 U.S. at 596, this case must be reversed.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

STEPHEN I. SCHLOSSBERG,
JOHN A. FILLION,
Attorneys for Petitioners.

JORDAN ROSSEN,
BERNARD F. ASHE,
STANLEY LUBIN,
Of Counsel.

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